Supreme Court, U.S.
FILED

10-163 JUL 19 2010

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No. 09A1037

IN THE
SUPREME COURT OF THE UNITED STATES

ANN THOMAS,
*Petitioner,*
v.
UNITED STATES,
*Respondent,*

On Writ of Certiorari
to the *UNITED STATES COURT OF APPEALS*
*FOR THE FEDERAL CIRCUIT*

# PETITION FOR THE PETITIONER

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*404-302-5363*

July 19, 2010

## QUESTION PRESENTED

Whether pay disparity must be a product of a "legitimate" business reason or a "gender neutral business justification in order to qualify as an exception to the Equal Pay Act (EPA) of 1963 under the Act's exception, "factors other than sex."

Whether and under what circumstances an employer can use statements unrelated to a merit pay system as justification to qualify as an exception to the Equal Pay Act (EPA) of 1963 under the Act's exception, "merit system."

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## BRIEF FOR THE PETITIONER

Petitioner Ann Thomas respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Federal Circuit and the United States Court of Federal Claims.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 2a-5a) is unpublished. United States Court of Federal Claims's order (Pet. App. 6a-27a) is published at 86 Fed. Cl. 633 (2009).

## JURISDICTION

The opinion of the court of appeals was entered on November 4, 2009. The court of appeals denied rehearing and rehearing en banc on February 23, 2010. (Pet. App. 29a). The Chief Justice extended the time to file the petition for certiorari until July 23, 2010. App. No. 09A1037. The Court has jurisdiction pursuant to 28 U.S.C. 1254.

## RELEVANT STATUTORY PROVISION

The Equal Pay Act ("EPA") was enacted in 1963 and was extended from private industry to the Federal Government in 1974. 29 U.S.C. §§ 201, 203(e) (2). The EPA in relevant part provides: No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on

the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. 29 U.S.C. § 206(d)(1). The Act "was established to protect against pay discrimination based on gender." *Yant v. United States*, 85 Fed. Cl. 264, 271 (2009). Under the Act, a plaintiff bears the burden of establishing a *prima facie* case that shows that he or she performed work that is similar to that performed by employees of the opposite sex involving equal skill, effort, and responsibility; that the work was performed under similar working conditions; and that the employer paid different wages to employees of opposite sexes for such work. *Lissak v. United States*, 49 Fed. Cl. 281, 284 (2001) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).

"Once a prima facie case has been established, the burden of proof shifts to the defendant to show that the wage disparities fall

under one of the four exceptions to the Act. *Id.* (citing *Corning Glass*, 417 U.S. at 196). The "exceptions" to the Act are also known as affirmative defenses. *See* 29 U.S.C. § 206(d)(1) (noting that seniority, merit, production-based pay, and "any other factor other than sex," are the four affirmative defenses available under the Act); *Corning Glass*, 417 U.S. at 196-97 (describing the four permissible reasons for pay disparity between genders permissible reasons for pay disparity between genders as both "exceptions" and "a matter of affirmative defense").

## STATEMENT OF THE CASE

The trial court found that genuine issues of material fact prevent summary judgment for either party on the issue of whether petitioner and any one of her male comparators do equal work. The court concluded, however, that there were no genuine issues of material fact as to whether the pay differential was based upon the United States Department of Labor's (DOL) merit system of pay. The court therefore granted the government's motion for summary judgment and dismissed Thomas' claim. The Appeals Court agreed with the Claims Court.

According to the DOL's Motion for Summary Judgment their affirmative defense is "merit system." But according to DOL's Responses to Interrogatories their affirmative defenses are "merit system" and "factors other than sex." (Pet. App. 30a – 32a) In the Motion, the information listed as "factors other than sex," are used to support the "merit system" affirmative defense.

In the Responses to Interrogatories and Motion, DOL states that its "merit system" is The Department of Labor Personnel ("DPR") manual, Chapter 335 "Promotion and Internal Placement Plan" in accordance with Title 5 United States Code(U.S.C.) and Title 5 Code of Federal Regulations(CFR) Part 335. (Pet. App. 33a – 44a) However, the Claims Court stated, "The affirmative defense pertinent to this case is the Federal Government's merit pay system, sometimes referred to as the General Schedule

(or GS) system." (Pet. App. 14a). The GS pay system covers the Petitioner and her comparators. The GS is now codified as part of Chapter 53 Title 5 U.S.C. § 5331–5338.

Information relied on by the claims court to support DOL's merit system claim includes: she became eligible for promotion to a GS-13 position, under the General Schedule merit system, on March 24, 2004. Her comparators had obtained GS-13 positions years before. Ms. Thomas has not alleged that she competed for any of the GS-13 positions held by her comparators. Ms. Thomas has not alleged that her comparators received their GS-13 positions by any means other than through the government's merit system. Two GS-13 vacancies in the Atlanta regional office, for which Ms. Thomas was eligible, went to other women. The regional offices of the ETA Division of Workforce Security had thirteen male GS-13 employees and thirteen female GS-13 employees at the time Ms. Thomas filed her complaint in this court, according to one statistic in the record. Two desk audits found that plaintiff's UI Specialist position was correctly classified as a GS-12. (Pet. App. 45a – 49a)

The Court of Appeals affirmed because it concluded that the government presented cogent evidence that DOL's merit system was an organized and structured procedure by which

employees were evaluated systematically and in accordance with predetermined criteria.

The court accepted the government's claim that the disparity in pay between petitioner and her comparators is not due to gender bias, but rather to the DOL's merit system – the promotion and internal placement plan.

The court rejected Petitioner's claim that Respondent's promotion and internal placement plan is not a merit pay system, and that the information listed as "factors other than sex," do not support DOL's "merit system" affirmative defense. DOL's promotion and placement plan and the information listed as "factors other than sex," in DOL's Responses to Interrogatories should have been considered under the Act's exception, "factors other than sex."

The court rejected all of Petitioner's arguments which included the fact that it was impossible for Petitioner to compete for the comparators positions – they obtained the positions, in most cases, years before Petitioner was even eligible to apply; Office of Personnel Management's (OPM) desk audits/classifications appeals do not compare whether two individuals perform equal work.( Pet. App. 47a). And, the fact that the Claims Court as well as other courts have rejected the courts acceptance of DOL's arguments that two female were promoted to GS-13 and recently hired or promoted twenty-six of its employees into GS-13 positions. Equal Pay statute prohibits individual pay decisions based

on sex—it does not require proof of discriminatory policy. *Ellison v. U.S.* 25 Cl. Ct. 487 (1992). Furthermore, "It is well-established that the fact that others of different gender are similarly treated cannot defeat a plaintiff's *prima facie* showing that he was paid differently than a similarly situated employee of the opposite sex. Id. (citing cases for proposition that "plaintiff need not compare herself to all similarly classified male employees"); *Molden v. United States*, 11 Cl. Ct. 604, 610-11 (1987); see also Corning Glass, 417 U.S. at 207-08 (to permit employer to escape equal pay obligations by allowing some members of the opposite sex higher pay would frustrate Congress's objectives). *Hauschild v. United States*, 53 Fed. Cl. 134 (2002).

The Government offers as a reason for its decision not to award Petitioner a GS-13 slot, the OPM"s classification decision of GS-12. The claims court was provided evidence that OPM does not base its decisions on comparing equal work and that DOL should do so. DOL never compared Petitioner's and her comparators work and the claims court found that genuine issues of material fact prevent summary judgment for either party on the issue of whether petitioner and any one of her male comparators do equal work.

Finally, the Government argued that the wage disparity between Petitioner and her

comparators could not have resulted from gender bias because half of the GS-13 promotions/hirings that DOL made on or after the time period that Petitioner was eligible for promotion went to female employees. These statistics were found to be irrelevant in other courts. The similar treatment of other female employees does not defeat a plaintiff's prima facie showing of an Equal Pay Act violation. See, e.g. *Hauschild*, 53 Fed. Cl. at 141 (citations omitted).

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF OTHER FEDERAL CIRCUIT DECISIONS.

The decision below contradicts the rule of three other circuits.

The Circuits disagree on whether a pay differential under the fourth statutory defense -- "any factor other than sex" -- must result from a "legitimate business reason" or whether it is enough that the factor be gender-neutral on its face and bona fide. The Second, Sixth, and Ninth Circuits require proof that the differential "pay is rooted in legitimate business-related differences." *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992), cert. denied, 506 U.S. 965; *EEOC v. J.C. Penny Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982). In contrast, the Sixth and

Seventh Circuits have rejected the view that defendant must prove that the "factor other than sex" was business-related, instead requiring proof that the factor was applied in a discriminatory manner or caused a discriminatory effect. *Fallon v. State of Ill.*, 882 F.2d 1206, 1211 (7th Cir. 1989); *Strecker v. Grand Forks County Social Serv. Bd.*, 640 F.2d 96 (8th Cir. 1981), overruled on other grounds, *Robino v. Norton,* 682 F.2d 192, 195 (1982).

See generally *Allison v. United States*, 39 Fed. Cl. 471, 476 (1997) (determining that material issue of fact regarding the government's fourth affirmative defense precluded the government's summary judgment claim without interpreting whether the defense required a legitimate business reason).

"The district court agreed that the different pay scales constituted a factor other than sex." Beck-Wilson et al. v. Principi 441 F. 3d 353,359 (6th Cir 2006).

In *EEOC v. Aetna Ins. Co.,* 616 F.2d 719 (4th Cir.1980), the Fourth Circuit held that Aetna's decision to pay a newly hired male insurance underwriter more than existing female underwriters "was attributable to the existence of two distinct salary programs" and "was explained by [his] experience and background, two considerations which were not sex-linked." *Id.* at

726. Similarly, in *Girdis v. EEOC,* 688 F.Supp. 40 (D.Mass.1987), the district court found no EPA violation where a male EEOC employee received higher pay than female employees due to the "good faith operation of *bona fide,* gender-neutral, acceptable government employment programs" and the court determined that the higher-paid male "*was qualified for his higher salary by his experience and background.*" *Id.* at 46-47 (emphasis added). In *Aldrich,*520 (2d Cir.1992), the Second Circuit held that "a job classification system [could] serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Id.* at 525.

Neither the Federal Circuit nor the Supreme Court has commented on the burden borne by a defendant raising an affirmative defense to an EPA claim as it moves for summary judgment. (Pet. App. 15a)

The claims court required the Plaintiff to prove that DOL's Promotion and Internal Placement Plan is not a merit pay system. But, the claims court did not require DOL to first meet its burden under the EPA- to produce sufficient evidence that its "merit system("Promotion and Internal Placement Plan") actually motivated the wage disparity.

It is a difficult task for the Plaintiff to show that DOL's Promotion and Internal Placement Plan is not a merit pay system when DOL did not describe how the Promotion and Internal Placement Plan meets the definition of a merit pay system nor does DOL describe how the Promotion and Internal Placement Plan created the pay disparity.

In *Corning v. Brennan,* the court decided that "the company became obligated to pay the women the same base wage as their male counterparts on the effective date of the Act. To permit the company to escape that obligation by agreeing to allow some women to work on the night shift at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress' ends". *See Shultz v. American Can Co.-Dixie Products,* 424 F.2d 356, 359 (CA8 1970); *Hodgson v. Miller Brewing Co.,* 457 F.2d 221, 227 (CA7 1972); *Hodgson v. Square D Co.,* 459 F.2d 805, 808-809 (CA6 1972). 417 U.S. 208

The base wage for the comparators is GS-13 step 1. Here, as in *Corning,* "the company could not cure its violation except by equalizing the base wages of female day inspectors with the higher rates paid the night inspectors. This result is implicit in the Act's language, its statement of purpose, and its legislative history." (417 U.S. 206)

"The company's final contention -- that it cured its violation of the Act when a new collective

bargaining agreement went into effect on January 20, 1969 -- need not detain us long. While the new agreement provided for equal base wages for night or day inspectors hired after that date, it continued to provide unequal base wages for employees hired before that date, a discrimination likely to continue for some time into the future." 417 U.S. 208

Likewise, DOL has continued to provide unequal base wages to Petitioner than her male comparators – discrimination likely to continue for some time into the future.

## II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE LEGISLATIVE HISTORY OF THE EQUAL PAY ACT.

The Supreme Court examined the legislative history behind the EPA in *Corning Glass Works v. Brennan*, 417 U.S. 188, 201(1974). The original version of the Equal Pay bill only allowed for two exceptions for wage differentials, those based on a seniority or merit increase system that did not discriminate on the basis of sex. Id. at 199. Due to a concern that this version of the bill did not include job evaluation systems, the amended version of the Act defined equal work in terms of "skill, effort, responsibility, and working conditions. Id. at 201. The Court found that Congress' intent in incorporating this language was to "ensure that wage differentials based upon *bona fide* job evaluation plans would be outside the

purview of the Act." Id. at 201. To support this intent, the Court quoted the House Report:

> This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination. Id. at 201.

Although the Court in *Corning* used the legislative history to interpret the phrase "working conditions" as used in the EPA, Id. at 201. Congress's characterizations of job evaluation plans and classification systems as bona fide demonstrate its intent to only allow factors tied to legitimate business reasons to defend against charges of discrimination.

The requirement for an acceptable business reason is consistent with the legislative history of the EPA relied on by the Court in *Corning*. The "factor other than sex" defense was intended to be a catch-all exception to cover bona fide business factors other than sex. However, requiring an employer to justify its use of a factor other than sex with a legitimate business reason test satisfies the two-step burden shifting required by the EPA. Requiring this test ensures that a defendant

employer prove that its wage discrepancy is not based on sex. Without the business reason test, employers would be able to merely articulate any factor other than sex, which does not satisfy the burden placed on defendants under EPA litigation.

## III. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF OTHER FEDERAL CIRCUIT EVALUATION OF AN "ANY OTHER FACTOR OTHER THAN SEX" EXCEPTION TO THE EPA.

Other circuits have held that a proper job reclassification within the framework of a position and pay classification system qualifies under the factor other than sex defense. See, e.g., *Strecker*, 640 F.2d at 100-03; *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251 (7th Cir.1985). These cases explain that this defense enables the employer to determine legitimate organizational needs and accomplish necessary organizational changes.

The Court of Federal Claims has generally adopted the less rigorous "rational basis" scrutiny. *Behm v.U.S.*, 68 Fed. Cl. at 400. Thus, the employer need only prove that the factor is gender-neutral on its face and used in good faith and not in a discriminatory manner in its application. Id. at 401 (citations omitted). Regardless of which standard applies, the employer must establish that the gender-neutral factor it identified is actually the factor creating the wage differential in question. *Mansfield v.U.S.*, 71 Fed. Cl. at 693 (citing *Stanziale v. Jargowsky Public Hlth Coord.*,

200 F.3d at 107-08). A defendant may defeat a plaintiff's Equal Pay Act Claim by demonstrating that the pay differential is "based on any other factor other than sex." 29 U.S.C.§ 206(d)(1). The employer "must prove that the gender-neutral factor it identified is actually the factor causing the wage differential in question." Id. at 693 (citing *Stanziale*, 200 F.3d at 107-08). "The factor other than sex exception was intended by Congress to be a 'broad general exception.' ... A primary purpose in adding this and other exceptions was to permit employers to utilize bona fide gender-neutral job evaluation and classification systems." *EEOC v. Maricopa Cty. Comm. College Distric*t 736 F2d 510 (9th Cir. 1984 citations omitted).

In the present case, Respondent originally asserted two affirmative defenses: the merit system defense and the "any other factor other than sex" in their Answer and Responses to Interrogatories. The courts decided under the Act's exception, "merit system," although DOL does not explain how the pay disparity was computed in their Promotion and Internal Selection Plan. Neither, does it explain whether or how these factors were derived from its pay system – the General Schedule.

The legislative history of the EPA relied on by the Court in *Corning* indicates Congress's intent is to characterize job evaluation plans and classification system as an "any other factor other than sex" defense.

## IV. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF OTHER FEDERAL CIRCUIT'S EVALUATION OF A "MERIT SYSTEM" EXCEPTION TO THE EPA.

The evidence on which the courts relied had little, if any, relevance to a "merit pay system." And, the court failed to consider other methods of promotion outside of DOL's Promotion and Internal Placement Plan.

In order to prove the merit system defense, an employer must show that it had in place an organized and structured procedure by which it evaluated employees systematically and in accordance with predetermined criteria. *Raymond v U.S*, 31 Fed. Cl. at 518 (citing *Ottaviani v. State Univ. of N.Y. at New Palz*, 679 F.Supp. 288, 337 (S.D.N.Y. 1988), aff'd, 875 F.2d 365 (2d Cir. 1989), cert. denied, 493 U.S. 1021 (1990).

The Federal classification standards program for positions in the General Schedule was established by the Classification Act of 1949, which has been codified in chapter 51 Title 5, U.S.C. DOL states that its "merit system" is The Department of Labor Personnel ("DPR") manual, Chapter 335 "Promotion and Internal Placement Plan" which is in accordance with Title 5 of the United States Code and Title 5 CFR Part 335.

The district court in *Beck-Wilson* concluded that pay scales met the affirmative defense of "any other factor other than sex", and did not consider whether the pay scales were valid seniority or merit systems. The Veterans Administration urged the Appeals Court to apply precedent from other courts that have held that a distinct salary program can serve as a "factor other than sex" defense to an EPA claim where the individual receiving the higher salary under the salary program has appropriate background and experience to explain the pay differential. In those cases, the "factor other than sex" defense established has been a sort of hybrid between the seniority and merit defenses. In those instances, the more highly-paid male employee was found to have greater experience or qualifications for the job, or to hold greater job responsibilities. *Beck-Wilson,* 353. In this case, DOL did not describe what background, experience, training, ability, qualifications, or job responsibilities explained the pay differential.

DOL does not base its merit system defense upon a showing of a system of employee evaluations or upon a showing of a system of advancement or reward for merit. It is not a "merit increase system" that periodically rewards employees monetarily based on performance. Federal agencies can use the rating of record as the sole basis for granting a performance award. Performance awards are lump-sum cash awards based on ratings of record and are for

performance during the previous appraisal period. Rating-based performance awards are included among the various types of awards available under part 451 Title 5, CFR. DOL never asserted that the pay differential was based on rating-based performance awards, job evaluation plans or classification system

Instead, DOL argues that its promotion and internal selection system is a merit system because it operates in compliance with the civil service laws and that the wage differential is a result of the proper operation of this system. A similar argument was rejected by the Sixth Circuit in *Marshall v. Kent State University*, 589 F.2d 255 (6th Cir.1978) (per curiam). In Marshall, Kent State argued that its classification of custodial employees in accordance with Ohio civil service laws constituted a merit system defense to Equal Pay Act allegations. The court held that the compliance with civil service laws did not establish a merit system defense and did not preclude a finding that Kent State had violated the Equal Pay Act. Id. at 255-56. "We agree with the Marshall court's conclusion. Whatever the precise contours of the merit system defense, compliance with civil service requirements is not sufficient in and of itself. Some evidence of systematic employee evaluation is necessary." Maxwell *v. City of Tucson*, 803 F2d. 444 (9th Cir. 1986).

Interrogatory No. 9, (Pet. App. 30a) Exhibit A, page 3, in Plaintiff's Motion for Summary Judgment, which was presented to the trial court, describes Defendant's reasons it claims meets the EPA exception, "factors other than sex." In its Summary Judgment Motion, DOL uses these same reasons to support a "merit system" exception to the EPA. The claims court accepted these reason as those which support a "merit system" exception.

These reasons do not meet the definition of a "merit system." They do not measure quantity or quality of performance, nor do they explain how the pay disparity was created by financial reward for outstanding experience, training and/or ability. A merit system which measures quantity or quality of performance and compensates employees accordingly is a valid defense for a pay differential under the Equal Pay Act. *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980) (citing S. - 24- Rep. No. 176, 88th Cong., at 4 (1963). Under such a merit system, an employer may reward employees financially for outstanding experience, training, and ability, so long as the pay differential is not based upon sex. *Aetna*, 616 F.2d at 725.

Respondent attributes any pay disparity between Petitioner and her male comparators to a merit system based on the numerous statutes and regulations governing the Federal employee pay system. Compliance with civil service laws

alone does not establish a merit system defense. *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986) (citing *Marshall v. Kent State Univ.*, 589 F.2d 255, 255-56 (6th Cir. 1978) (per curiam).

DOL's Promotion and Internal Selection Plan does not meet the definition of a "merit system." It does not measure quantity or quality of performance, nor does it explain how the pay disparity was created by financial reward for outstanding experience, training and/or ability. A merit system which measures quantity or quality of performance and compensates employees accordingly is a valid defense for a pay differential under the Equal Pay Act. Aetna, 616 F.2d at 719, 725 (4th Cir. 1980) (citing S. - 24- Rep. No. 176, 88th Cong., at 4 (1963)). Under such a merit system, an employer may reward employees financially for outstanding experience, training, and ability, so long as the pay differential is not based upon sex. *Aetna*, 616 F.2d at 725.

## V. THE OPINION BELOW CONFLICTS WITH ANOTHER RULING OF THE FEDERAL CLAIMS COURT.

The decision below is in direct opposition to the decision the Federal Claims Court reached in a similar case regarding a federal merit system claim and the requirement to meet a "merit system" affirmative defense to the EPA.

In *Murtagh-Cooke v. U.S.* Cl. Ct.(2008), Defendant, the National Transportation and

Safety Board (NTSB) attributes any pay disparity between the Plaintiff, Ms. Murtagh Cooke and her male comparators to a merit system based on the numerous statutes and regulations governing the Federal employee pay system. NTSB asserted that it could not have promoted Ms. Murtagh Cooke to an SES slot because no SES slots were available when the NTSB created the modal director positions. Plaintiff, on the other hand, argued that, within this system, the NTSB had several options by which it could have reduced or eliminated her pay differential. The NTSB could have allocated Ms. Murtagh Cooke one of the vacant SES slots that existed during her tenure; given her a Limited Term SES appointment; provided her with overtime pay; given her a quality step increase; granted her a higher performance award; designated her an SL position; or awarded her a retention allowance.

The Federal Claims Court in that case concluded that, "The Government's contention that it could not have reassigned the non-career slot to the OMS director position is incorrect." "The NTSB had the discretion, and indeed the legal responsibility in complying with the Equal Pay Act, to reassign the vacant general SES slot to the OMS director position or at least convert the position to a Limited Term SES appointment." "Even if the NTSB could not have allocated an SES slot to the OMS director position sooner, the Court agrees with Plaintiff that the agency had several other alternatives by

which it could have reduced or eliminated the pay disparity." Murtagh-Cooke v. *U.S.* Cl. Ct.(2008).

The opinion below did not consider alternative method to reduced or eliminated pay disparity or for advancement which is outside DOL's Promotion and Internal Placement Plan.

The Claims court accepted DOL's argument that, the disparity in pay is due to DOL's merit based competitive system – The Department of Labor Personnel ("DPR) manual, Chapter 335 "Promotion and Internal Placement Plan," established as required by 5 C.F.R. 335.103; and stated that the plaintiffs had not presented any evidence to rebut this showing. (Pet. App.22a - 23a). The record, however, does contain evidence to rebut this claim. The Promotion and Internal Placement Plan, (Pet. App. 33a - 44a), submitted by DOL as Appendix A70, attached to its motion for summary judgment, expressly speaks to actions covered and not covered by the plan; as well as, its requirement to follow applicable law and regulations. The Promotion and Internal Placement Plan states that, "Announcing a vacancy under this Plan is only one method of locating applicants for a position and may be used in conjunction with other methods, such as competitive examining appointments and "excepted" service appointments. Subject to applicable law and regulations, the method(s) to be used in identifying candidates and the selection of an individual to fill a position is the

decision of management. This Plan in no way restricts management's right to make selections under other legitimate authorities for filling DOL vacancies." (Pet. App. 34a). The EPA statute was extended to the federal government in 1974. 29 U.S.C. § 203(e) (2).

DOL offers as its gender-neutral explanation for Petitioner's pay differential, its promotion and selection requirement that all non-career ladder promotions must be done through open merit based competitions. Yet, Defendant's Statement of Undisputed Facts No. 87, which was presented to the claims court provided evidence that all non career promotions at DOL are not done through a competitive process. "Promotions are generally on a competitive basis....., individuals that are certified in ETA's Leadership Program are eligible for promotions .....in a non-competitive process." (Pet. App. 50a).

## CONCLUSION

For the forgoing reasons, petitioners submit that this Court should grant review in this case to reverse the holding of the United States Court of Appeal for the Federal Circuit. Petitioners would also ask this Court to remand the case to the United States Federal Claims Court to apply intermediate scrutiny under the Equal Pay Act.

Respectfully submitted this 20th day of July, 2010,

By: Ann Thomas

ANN THOMAS, Pro Se
P.O. BOX 1814
Atlanta, GA 30301
(404) 302-5363

# APPENDIX

NOTE: This disposition is nonprecedential.

# United States Court of Appeals for the Federal Circuit

2009-5093

ANN THOMAS,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Ann Thomas, of Atlanta, Georgia, pro se.

Carrie A. Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for defendant-appellee. With her on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Steven J. Gillingham, Assistant Director.

Appealed from: United States Court of Federal Claims

Judge Lynn J. Bush

NOTE: This disposition is nonprecedential.

# United States Court of Appeals for the Federal Circuit

2009-5093

ANN THOMAS,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 07-CV-212,

Judge Lynn J. Bush.

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DECIDED: November 4, 2009

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Before MAYER, LOURIE, and RADER, Circuit Judges.

PER CURIAM.

Ann Thomas appeals the judgment of the United States Court of Federal Claims which: (1) denied her motion for summary judgment under the Equal Pay Act, 29 U.S.C. § 206 (2006), and (2) granted the government's motion for summary judgment on the basis of its affirmative defense of a merit system of pay. Thomas v. United States, 86 Fed. Cl. 633 (2009). We affirm.

Thomas is employed as a GS-12 Unemployment Insurance Specialist ("UI Specialist") for the Department of Labor ("DOL") in its Atlanta regional office. She claims that the

agency violated the Equal Pay Act by paying her at a lower pay grade than three male UI Specialists who are paid at the GS-13 level. She alleges that these three male employees have positions that require "equal skill, effort, and responsibility, and which are performed under similar working conditions" as her position. 29 U.S.C. § 206(d)(1).

The trial court found that genuine issues of material fact regarding whether Thomas' position was substantially equal to the jobs of her alleged comparators precluded granting summary judgment in her favor. The court concluded, however, that there were no genuine issues of material fact as to whether the pay differential was based upon the DOL's merit system of pay, which is a statutory affirmative defense to an Equal Pay Act claim. Thomas, 86 Fed. Cl. at 640-41 (citing 29 U.S.C. § 206(d)(1)). The court therefore granted the government's motion for summary judgment and dismissed Thomas' claim.

We review a grant of summary judgment by the Court of Federal Claims de novo. Suess v. United States, 535 F.3d 1348, 1359 (Fed. Cir. 2008). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. Thomas presents a general complaint about DOL's hiring and promotion system, alleging that it is not systematic or organized as required of a merit-based system, and that the agency recently promoted two women to the GS-13 level only

because it was seeking a defense against her discrimination suit. We find these contentions unpersuasive.

The government presented uncontroverted evidence that Thomas reached the top of her career ladder, and had been promoted as far as she could be without participating in a competitive hiring process. It also showed that the three alleged male comparators were awarded their GS-13 positions through hiring processes in which Thomas did not compete. Although Thomas apparently competed for two other GS-13 positions in her regional office, she was determined not to have been the most qualified candidate for the positions. The fact that these positions were ultimately awarded to other female candidates seriously undermines Thomas' contention that her non-selection was the result of gender discrimination. Thomas contends that the DOL's system of hiring and promotion is not merit-based, but she fails to produce evidentiary support for her contentions. The government presented cogent evidence that the DOL's merit system "was an organized and structured procedure by which employees were evaluated systematically and in accordance with predetermined criteria." Raymond v. United States, 31 Fed. Cl. 514, 518 (1994). As the trial court correctly determined, any alleged pay differential fell into the Equal Pay Act's merit system exception. Disposition of her case through summary judgment was therefore appropriate.

In the United States Court of Federal Claims

No. 07-212 C

(Filed April 1, 2009)

* * * * * * * * * * * * * * *

ANN THOMAS, *Pro se*,
*Plaintiff*,

v.

THE UNITED STATES,
*Defendant*.

***********

Civilian Pay; Equal Pay Act of 1963, 29 U.S.C. § 206 (2006); *Prima Facie* Case; Burden on Summary Judgment to Establish an Affirmative Defense under the Equal Pay Act; Merit System.

* * * * * * * * * * * * * * * * *

*Ann Thomas*, Atlanta, GA, *pro se*.

*Carrie A. Dunsmore*, United States Department of Justice, with whom were *Gregory G. Katsas*, Assistant Attorney General, *Jeanne E. Davidson*, Director,
*Steven J. Gillingham*, Assistant Director,
Washington, D.C., for defendant.1

**OPINION**

**Bush**, *Judge*.

This case is before the court on cross-motions for summary judgment under Rule 56 of the Rules of the United States Court of Federal Claims (RCFC).

These motions have been thoroughly briefed, and oral argument was neither requested by

1/ At different times, Ms. Dunsmore and Ms. Michelle R. Milberg have been lead counsel for defendant; they both have submitted briefs which are now before the court.

the parties nor deemed necessary by the court. Plaintiff has ably and clearly articulated arguments proposing summary judgment in her favor and resisting summary judgment for the government. Nonetheless, for the reasons set forth below, the court grants defendant's motion and must dismiss plaintiff's claims.

2/ Before the court are Plaintiff's Motion for Summary Judgment (Pl.'s Mot.), filed April 11, 2008; Plaintiff's Proposed Findings of Uncontroverted Fact (Pl.'s Facts), filed April 11, 2008; Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment (Def.'s Mot.), filed April 30, 2008; Defendant's Response to Plaintiff's Proposed Findings of Uncontroverted Fact (Def.'s Resp. to Facts), filed April 30, 2008; Defendant's Statement of Undisputed Fact (Def.'s Facts), filed April 30, 2008; Plaintiff's Response to Defendant's Motion for Summary Judgment (Pl.'s Reply), filed June 2, 2008; Plaintiff's Response to Defendant's Statement of Undisputed Fact (Pl.'s Resp. to Facts), filed June 6, 2008; Defendant's Reply Brief in Support of its Motion for Summary Judgment (Def.'s Reply), filed June 27, 2008; Plaintiff's Motion for Leave to File Sur-Reply, filed July 16, 2008, and Plaintiff's Motion for Leave to Add One Paragraph to the Sur-Reply Brief and Seven Pages to the Appendix, filed August 7, 2008 (together, Pl.'s Sur-Reply); and Defendant's Sur-Reply to Plaintiff's Sur-Reply to Defendant's Cross-Motion for Summary Judgment (Def.'s Sur-Reply), filed December 23, 2008. 3/ Although plaintiff's complaint compares Ms. Thomas to twelve male UI

Specialists working in various regional ETA offices, in moving for and resisting summary judgment, Ms. Thomas has only alleged facts concerning three specific male UI Specialists. *See* Pl.'s Facts ¶ 2; Def.'s Mot. at 31; Def.'s Reply at 7-8. Thus, the court must decide in this opinion whether, as a matter of law, the disparity in the pay received by Ms. Thomas, and that received by Mr. James Laham, Mr. Raymond Koch, and Mr. Randolph Fadler, is permissible. *See* Pl.'s Facts ¶ 2 ("Defendant pays three men, James Laham, Ray Koch, and Randolph Fadler at a higher pay grade GS-13.").

## BACKGROUND

Ms. Ann Thomas works as an Unemployment Insurance Program Specialist (UI Specialist) in Atlanta, Georgia, for the Region III office of the United States Department of Labor (DOL), Employment and Training Administration (ETA), in the Division of Workforce Security (DWS). Pl.'s Facts ¶¶ 1, 7; Def.'s Facts ¶ 6; Pl.'s Resp. to Facts ¶ 6. The complaint alleges that Ms. Thomas is paid less than three male UI Specialists whose responsibilities "requir[e] equal skill, effort and responsibility, and which are performed under similar working conditions."3 Compl. ¶¶ 6-9; *see* Pl.'s Facts ¶ 2. Plaintiff argues that the United States has violated the Equal Pay Act of 1963, 29 U.S.C. § 206 (2006), by paying her at a lower pay grade than three male "comparators," when these four UI Specialists all

4/ These federal employees receive salaries based on the GS (General Schedule) grade level of their positions. 5/ These statistics refer only to employees with three years tenure in the Division of Workforce Security, as of late 2007.

perform equal work for ETA regional offices. Compl. at 3. While Ms. Thomas is a GS-12 UI Specialist, her three male comparators are all GS-13 UI Specialists and therefore receive higher salaries.4 Ms. Thomas appears to have risen to the rank of GS-12 UI Specialist by March 24, 2003, *see* Pl.'s Facts ¶¶ 8-9; Pl.'s Mot. at 4, and has been employed as a GS-12 UI Specialist for approximately six years. Mr. James Laham works at the Region I ETA office in Boston, Massachusetts, as a GS-13 UI Specialist. Def.'s Facts ¶ 31. The ETA Division of Workforce Security in Boston has, in addition to Mr. Laham, two other male GS-13 employees, one female GS-13 employee, two male GS-12 employees and one female GS-12 employee.5 Pl.'s Mot. Ex. A (Def.'s Resp. to Pl.'s Interrog. 4). Mr. Laham has been a GS-13 UI Specialist for approximately twenty years. Def.'s Mot. App. at 91. Mr. Raymond Koch works at the Region V ETA office in Chicago, Illinois, as a GS-13 UI Specialist. Def.'s Facts ¶ 18. The ETA Division of Workforce Security in Chicago has, in addition to Mr. Koch, three other male GS-13 employees, three female GS-13 employees, no male GS-12 employees and no female GS-12 employees. Pl.'s Mot. Ex. A (Def.'s Resp. to Pl.'s Interrog. 4). Mr. Koch has been a GS-13 UI Specialist for approximately seven years. Def.'s Mot. App. at 25. Mr. Randolph Fadler works at the Region III ETA office in Atlanta, Georgia, as a GS-13 UI Specialist. Def.'s Facts ¶ 55. The ETA Division of Workforce Security in Atlanta has, in addition to Mr. Fadler, no other male GS-13

employees, one female GS-13 employee, one male GS-12 employee and one female GS-12 employee. Pl.'s Mot. Ex. A (Def.'s Resp. to Pl.'s Interrog. 4). Mr. Fadler has been a GS-13 UI Specialist for approximately seven years, and was a GS-13 employee of the Department of Labor in Washington, D.C. for approximately seventeen years before taking a job in the Region III office in Atlanta. Def.'s Mot. App. at 29.

6/ Jurisdiction over plaintiff's claim is undisputed. *See Harbuck v. United States*, 378 F.3d 1324, 1330 (Fed. Cir. 2004) (noting that the plaintiff in that case "could . . . have filed her Equal Pay Act case in the Court of Federal Claims"); *Cooke v. United States*, 85 Fed. Cl. 325, 341 (2008) ("The Equal Pay Act constitutes . . . a money mandating statute over which this Court has jurisdiction.") (citation omitted).

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Ms. Thomas has made at least four attempts to upgrade her GS-12 pay level, before filing her claim in this court. In 2004, plaintiff asked for a "desk audit" of her position by the Department of Labor, because she felt her job merited GS-13 pay. Def.'s Facts ¶ 78. The desk audit indicated that her GS-12 position was correctly classified as a GS-12. *Id.* Ms. Thomas then requested a second desk audit, from the United States Office of Personnel Management (OPM). *Id.* ¶ 79. OPM also determined that plaintiff's position was correctly classified as a GS-12. *Id.* Thereafter, Ms. Thomas twice competed for an open GS-13 UI Specialist position in the Region III ETA office in Atlanta, in 2006 and again in 2007. *Id.*¶ 90. In each instance, a woman other than Ms. Thomas was hired. *Id.* Ms. Thomas filed

her Equal Pay Act claim in this court on March 30, 2007.6

DISCUSSION

I. *Pro Se* Litigants

The court acknowledges that Ms. Thomas is proceeding *pro se*, and is "not expected to frame issues with the precision of a common law pleading." *Roche v. U.S. Postal Serv.*, 828 F.2d 1555, 1558 (Fed. Cir. 1987). *Pro se* plaintiffs are entitled to a liberal construction of their pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (requiring that allegations contained in a *pro se* complaint be held to "less stringent standards than formal pleadings drafted by lawyers"). Accordingly, the court has examined the complaint and briefs thoroughly and has attempted to discern all of plaintiff's legal arguments.

II. Standard of Review for RCFC 56 Cross-Motions

The moving party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." RCFC 56(c). Cross-motions for summary judgment "are not an admission that no material facts remain at issue." *Massey v. Del Labs., Inc.*, 118

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F.3d 1568, 1573 (Fed. Cir. 1997) (citing *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978)). The parties may focus on different legal principles and allege as undisputed a different set of facts. *Id.* "Each party carries the burden on

its own motion to show entitlement to judgment as a matter of law after demonstrating the absence of any genuine disputes over material facts." *Id.* "[A] party seeking summary judgment always bears the initial responsibility of informing the . . ..court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting former version of Fed. R. Civ. P. 56(c)). A genuine issue of material fact is one that could change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A summary judgment "motion may, and should, be granted so long as whatever is before the . . . court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Celotex*, 477 U.S. at 323. Any evidence presented by the non-movant is to be believed and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). The burden on Ms. Thomas, as a party resisting summary judgment, has been concisely described by the United States Supreme Court in the following statement: When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with "specific

facts showing that there is a *genuine issue for trial.*" Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (footnote and citations omitted). "[S]ummary judgment is a salutary method of disposition designed to secure the just, speedy and inexpensive determination of every action." *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (internal quotations and citations omitted).
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**III. Statutory Scheme**
The Equal Pay Act (the Act) in relevant part provides: No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and
responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a

wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. 29 U.S.C. § 206(d)(1). The Act "was established to protect against pay discrimination based on gender." *Yant v. United States*, 85 Fed. Cl. 264, 271 (2009). Under the Act, a plaintiff bears the burden of establishing a *prima facie* case that shows that he or she performed work that is similar to that performed by employees of the opposite sex involving equal skill, effort, and responsibility; that the work was performed under similar working conditions; and that the employer paid different wages to employees of opposite sexes for such work. *Lissak v. United States*, 49 Fed. Cl. 281, 284 (2001) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)). "Once a prima facie case has been established, the burden of proof shifts to the defendant to show that the wage disparities fall under one of the four exceptions to the Act. *Id.* (citing *Corning Glass*, 417 U.S. at 196). The "exceptions" to the Act are also known as affirmative defenses. *See* 29 U.S.C. § 206(d)(1) (noting that seniority, merit, production-based pay, and "any other factor other than sex," are the four affirmative defenses available under the Act); *Corning Glass*, 417 U.S. at 196-97 (describing the four permissible reasons for pay disparity between genders as both "exceptions" and "a matter of affirmative defense"). The affirmative defense pertinent to this case is the federal government's merit pay system, sometimes referred to as the General Schedule (or GS) system, in which a GS-13

employee will generally receive a higher salary than a GS-12 employee. The United States Court of Appeals for the Federal Circuit has not discussed the relative burdens on the parties in Equal Pay Act cases when a court is weighing cross-motions for summary judgment. It is clear, however, from non-binding precedent from this court and other courts, as well as binding precedent governing RCFC 56, that some Equal Pay Act cases may be resolved on summary judgment, as will be discussed *infra*.

**IV. Genuine Issues of Material Fact as to a *Prima Facie* Violation of the Equal Pay Act**

It is undisputed that Ms. Thomas, Mr. Laham, Mr. Koch and Mr. Fadler are all UI Specialists in regional ETA offices, and that Mr. Laham, Mr. Koch and Mr. Fadler are paid more than Ms. Thomas, their female colleague. Both parties assert that they are entitled to summary judgment on the issue of whether Ms. Thomas has met the burden of establishing a *prima facie* violation of the Equal Pay Act. *See* Pl.'s Mot. at 3 ("Defendant has not shown in its Answer or during discovery attempts any differences in responsibility performed by plaintiff and her higher paid comparators."); Def.'s Mot. at 22 ("Ms. Thomas has failed to establish that her job was substantially equal to the jobs of her alleged comparators, and therefore cannot establish her *prima facie* case."). Neither party is entitled to summary judgment on this issue, however, because the comparison of the work duties of Ms. Thomas and her three male colleagues is pervaded by

genuine issues of material fact. As a threshold issue, however, the court turns to defendant's argument that two of the male comparators chosen by Ms. Thomas do not work within the same establishment," as required by 29 U.S.C. § 206(d)(1), and are 7/ This court's predecessor court has opined that a dispute over the "establishment" from which comparators have been chosen will not prevent a plaintiff from establishing a *prima facie* violation of the Act. *See Molden v. United States*, 11 Cl. Ct. 604, 611 n.4 (1987) (suggesting "that the definition of the word establishment, as that term is used in the Act, is not material to the making of a prima facie case . . . [and] that plaintiffs, in order to establish a prima facie case, need merely show that an employer is paying different wages to employees of the opposite sex for the performance of similar work under similar working conditions") (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974); *E.E.O.C. v. Maricopa County Cmty. Coll. Dist.*, 736 F.2d 510, 513 (9th Cir. 1984)). Whatever the merits of this view, the court need not decide that question. Here, there are other genuine disputes of material fact which deny both plaintiff and defendant summary judgment on the issue of whether Ms. Thomas has established her *prima facie* case.
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thus not appropriate comparators for the purposes of the Act.7 Def.'s Mot. at 24-25.

**A. Whether the Six Regional ETA Division of Workforce Security Offices Constitute One Establishment**

Mr. Laham and Mr. Koch work, respectively, in ETA's Boston and Chicago regional offices. According to information provided by defendant to plaintiff, each of the ETA Division of Workforce Security regional offices has a handful of long term employees (who have worked at least three years in DWS): Atlanta-four employees; Boston-seven

employees; Chicago-seven employees; Dallas-nine employees; Philadelphia-two employees; and San Francisco-eight employees. Pl.'s Mot. Ex. A (Def.'s Resp. to Pl.'s Interrog. 4). Despite the fact that the regional DWS offices together constitute a small sub-unit of DOL, one which has a national mission and programmatic focus, and which operates under the federal government's GS merit-based pay system and centralized oversight of personnel matters, defendant insists that for the purposes of the Equal Pay Act, each regional ETA office must be considered to be a separate establishment. Def.'s Mot. at 24-25. For this proposition, defendant relies principally on a regulation, 29 C.F.R. § 1620.9 (2008), which generally defines an establishment" to be "a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business," § 1620.9(a). The regulation, however, also states that "unusual circumstances may call for two or more distinct physical portions of a business enterprise being treated as a single establishment." *Id.* § 1620.9(b).

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The court has before it several allegations of fact presented by plaintiff which, given all justifiable inferences, create a genuine issue of material fact as to whether the six regional ETA Division of Workforce Security offices are one establishment. Plaintiff has alleged that many personnel decisions are made by a centralized ETA office, not in the regional ETA offices. Pl.'s Reply at 7 (stating that a

central ETA office determines "when [the regional office] can hire, determines which Regional Offices will be able to hire, the number of persons that can be hired, and at what grade level [new employees] can be hired"). Ms. Thomas also has provided documentation of work assignments which transcend the geographic boundaries of the regional offices' respective territories. Pl.'s Sur-Reply at 2. An "unusual" establishment, *i.e.*, one which can be considered to be a single establishment despite multiple, geographically-dispersed offices, is described by an example given in the relevant regulation cited by defendant: For example, a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions. 29 C.F.R. § 1620.9(b). The facts alleged by Ms. Thomas may describe an unusual, multi-location establishment, when the court accords her factual allegations all justifiable inferences, as it must for a party resisting summary judgment. The court has found no caselaw that would categorically exclude the six regional ETA Division of Workforce Security offices from being considered a single establishment" under the Equal Pay Act. *See, e.g.*, *Grumbine v.*

*United States*, 586 F. Supp. 1144, 1148 (D.D.C. 1984) (stating that "at least for purposes of public employment, the geographic reach of the term 'establishment' is not automatically determined by geography, as the government would have it, but depends upon the degree to which the particular governmental entity has centralized its personnel administration") (footnote omitted). Some courts have found the interpretation of the term "establishment," in the context of a particular Equal Pay Act case, to depend on disputed, material facts, and have refused to rule on this issue at the summary judgment phase of litigation. *See, e.g., Lenihan v.Boeing Co.*, 994 F. Supp. 776, 800 (S.D. Tex. 1998) (denying the employer's summary judgment motion on an Equal Pay Act claim, in part because the parties disputed whether two plants, one in Houston, Texas, and the other in Huntsville,

8/ Defendant asserts that the desk audits of plaintiff's position, confirming that the GS-12 rating of her job was correct, rebut plaintiff's *prima facie* case. Def.'s Reply at 6-7. The court agrees that the desk audits support defendant's view of the facts. These audits do not, however, remove all genuine issues of material fact as to whether Ms. Thomas and her comparators were doing equal work, as defined by the Equal Pay Act. *See, e.g., Gunther v. County of Washington*, 623 F.2d 1303, 1309 (9th Cir. 1979) (stating that when a plaintiff wishes to show that jobs are substantially equal, "actual job performance and content[,] not job titles, classifications or descriptions[, are] determinative") (citations omitted), *aff'd on other grounds*, 452 U.S. 161

(continued...)

Alabama, constituted a single establishment); *Brownlee v. Gay & Taylor, Inc.*, 642 F. Supp. 347, 352 (D. Kan. 1986) (denying the employer's motion for summary judgment on a Equal Pay Act claim which involved disputes of fact, including a dispute as to whether multiple company offices within a certain region of the country constituted a single establishment). Because disputed issues of material fact remain as to the proper establishment from which Ms. Thomas may choose comparators, the court denies defendant summary judgment on this issue.

**B. Whether Ms. Thomas and Her Comparators Performed Equal Work**

Plaintiff, representing herself *pro se*, has assembled a massive quantity of documentation and allegations of fact describing her position and those of her comparators. *See* Pl.'s Mot. at 2-3 & App. Exs. A-E; Pl.'s Reply at 2-7 & App.; Pl.'s Sur-Reply at 3-5 & App. Defendant has similarly presented copious documentation and allegations of fact concerning the positions of Ms. Thomas and her comparators. Even without reviewing this body of conflicting nformation in detail, the court notes that genuine issues of fact are discernable. Defendant disagrees with plaintiff's description of the primary duties of Mr. Laham and Mr. Koch. Def.'s Resp. to Facts ¶¶ 4-5. Plaintiff disagrees with defendant's description of her work duties, Pl.'s Resp. to Facts ¶¶ 7-17, and disagrees with defendant's allegation that she requires more supervision than Mr. Fadler or Mr. Laham, Pl.'s

Reply at 10. Ms. Thomas suggests that "[t]he documents attached to this Sur-Reply, Plaintiff's Affidavit, and Plaintiff's performance evaluations are proof that the Plaintiff's job duties are the same as Mr. Raymond [Koch], Mr. James Laham, and Mr. Randolph Fadler." Pl.'s Sur-Reply at 5. Giving all justifiable inferences to plaintiff's allegations of fact, the court finds that genuine issues of material fact prevent summary judgment for either party on the issue of whether Ms. Thomas and any one of her male comparators do equal work.8

*ee,*8(...continued) (1981).

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*e.g., Hauschild v. United States*, 53 Fed. Cl. 134, 138-39 (2002) (denying summary judgment on a *prima facie* case under the Equal Pay Act "[b]ecause numerous genuine issues of material fact are present as to whether plaintiff and [a comparator] performed the same or substantially the same work on jobs requiring equal skill, effort, and responsibility, and under similar working conditions").

**V. No Genuine Issues of Material Fact as to Defendant's Affirmative Defense of a Merit System of Pay**

Even if Ms. Thomas had established a *prima facie* case under the Act, defendant has raised an affirmative defense to her claim: Assuming that this Court were to find that Ms. Thomas has established her *prima facie* case, this Court should nonetheless grant our motion for summary judgment because any pay disparity between Ms. Thomas and her

alleged comparators was not based upon gender. Specifically, any pay disparity that might exist falls within an exception to the [Act], a merit system. Def.'s Mot. at 31-32 (citing 29 U.S.C. § 206(d)(1)). To prevent defendant from prevailing on its RCFC 56 motion, Ms. Thomas "must do more than simply show that there is some metaphysical doubt as to the material facts" related to this affirmative defense of a merit pay system. *See Matsushita Electric*, 475 U.S. at 586 (citations omitted). Plaintiff "must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Id.* at 587 (citations omitted). Although neither the Federal Circuit nor the Supreme Court has commented on the burden borne by a defendant raising an affirmative defense to an Equal Pay Act claim as it moves for summary judgment, it is clear that this burden is a heavy one. *See, e.g.*, *Stanziale v. Jargowsky*, 200 F.3d 101, 108 (3rd Cir. 2000) (stating that "where, as here, employers seek summary judgment as to the Equal Pay Act claim, they must produce sufficient evidence such that no rational jury could conclude but that the proffered reasons actually motivated the wage disparity of which the plaintiff complains"); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995) (noting that the employer's burden for proving its affirmative defense is a heavy one) (citation
12
omitted); *Mansfield v. United States*, 71 Fed. Cl. 687, 693 (2006) (noting that "[t]he employer's burden to establish an affirmative defense under the [Act] is

a heavy one") (citations omitted); *Hauschild*, 53 Fed. Cl. at 139 (stating that "[t]he burden of proving that a factor other than sex underlies the wage differential is a heavy one") (citation omitted). Here, according to the facts either presented by or unchallenged by Ms. Thomas, she became eligible for promotion to a GS-13 position, under the General Schedule merit system, on March 24, 2004. Pl.'s Facts ¶ 9. Her comparators had obtained GS-13 positions years before. *See* Def.'s Mot. App. at 25, 29, 91. Ms. Thomas has not alleged that she competed for any of the GS-13 positions held by her comparators. *Id.* at 21, 37. Ms. Thomas has not alleged that her comparators received their GS-13 positions by any means other than through the government's merit system. Two GS-13 vacancies in the Atlanta regional office, for which Ms. Thomas was eligible, went to other women. Def.'s Facts ¶ 90. The regional offices of the ETA Division of Workforce Security had thirteen male GS-13 employees and thirteen female GS-13 employees at the time Ms. Thomas filed her complaint in this court, according to one statistic in the record. Pl.'s Mot. App. Ex. A (Def.'s Resp. to Pl.'s Interrog. 4). Two desk audits found that plaintiff's UI Specialist position was correctly classified as a GS-12. Def.'s Facts ¶¶ 78-79. This record can only be read to show that the government's highly structured and regulated merit system, not gender, explains the pay disparity between Ms. Thomas and her comparators. Plaintiff has not cast any doubt upon the facts before the

court. Plaintiff alleges that ETA has recently hired or promoted twenty-six of its employees into GS-13 positions, but this bare allegation does not in any way show that the government's merit system has not accounted for the pay disparity between Ms. Thomas and her comparators. Pl.'s Mot. at 7-8. Ms. Thomas also states that "[d]efendant's merit system is merely a promotion and internal placement plan designed to insure a systematic means of selection for position vacancies based on merit. It does not insure that employees performing jobs requiring equal skill, effort and responsibility receive the same rate of pay." Pl.'s Reply at 10. This argument, even if true, in no way implies that the government's merit system does not explain the pay differential between Ms. Thomas and her comparators. Finally, although plaintiff has alleged that "ETA hires and transfers inexperienced individuals to positions above and at journey (*i.e.*, the GS-12 UI Specialist) level," this allegation was made in reference to two female ETA employees, and does not

9/ There are two responses to interrogatories, numbered 20 and 21, related to the prior work experience of two female ETA employees. Pl.'s Mot. App. Ex. A (Def.'s Resp. to Interrogs. 20-21). There is also a response to an additional interrogatory numbered 21 (which, because it is followed in plaintiff's appendix by interrogatory 23, must be interrogatory 22), which does not discuss the prior work experience of individual ETA employees. *See id.* (Def.'s Resp. to Interrog. 2[2]). Plaintiff's references to these responses to interrogatories fail to allege any specific facts which contradict the merit system defense to her claim under the Act.

address defendant's contention that the government's merit system is the reason for the pay disparity between Ms. Thomas and her comparators.9 Pl.'s Resp. to Facts ¶¶ 85-87, 91 (citing Pl.'s Mot. App. Ex. A (Def.'s Resp. to Interrogs. 20-21)). Upon this record, giving all justifiable inferences to Ms. Thomas, a rational factfinder would necessarily conclude that the government's merit system, not gender, produced the pay disparity that plaintiff challenges in this court. Thus, although defendant bore a heavy burden with respect to its affirmative defense, the pay disparity between Ms. Thomas and her comparators can only be explained by the government's merit system. There is no need to proceed to trial on a plaintiff's Equal Pay Act claim, when the employer's affirmative defense has been established and there are no genuine issues of material fact preventing summary judgment in its favor. *See, e.g.*, *Timmer v. Mich. Dep't of Commerce*, 104 F.3d 833, 844 (6th Cir. 1997) (granting summary judgment to state agencies which had brought forth "substantial evidence that the wage disparity was caused by an inadvertent misapplication of the job classification system"); *Thomas v. Cmty. Coll. of Phila.*, 553 F. Supp. 2d 511, 516 (E.D. Pa. 2008) ("Defendant has carried its heavy burden of establishing that the pay differential was based on a factor other than sex, and summary judgment is appropriate."); *Day v. Krystal Co.*, 471 F. Supp. 2d 874, 894 (E.D. Tenn. 2007) (granting summary judgment on employer's

affirmative defense because the plaintiff failed to "come forward with evidence demonstrating a triable issue of fact") (citation omitted); *E.E.O.C. v. TXI*
*Operations, L.P.*, 394 F. Supp. 2d 868, 881 (N.D. Tex. 2005) (granting summary judgment to employer on affirmative defense to an Equal Pay Act claim); *Birks v.Jack Ingram Motors, Inc.*, 346 F. Supp. 2d 1216, 1222 (M.D. Ala. 2004) (granting summary judgment to employer for a "greater experience" affirmative defense explaining a pay disparity); *Sullivan v. Delphi Auto. Sys. Corp.*, 198 F. Supp. 2d 952, 963 (S.D. Ohio 2002) (granting summary judgment on a seniority system affirmative defense, "without addressing the question of whether the Plaintiff has made out a *prima facie* case"); *Lissak*, 49 Fed. Cl. at 287 (granting summary judgment to the federal government because its salary policies showed "no evidence of pretext or discrimination"). There are no specific allegations of fact before the court which undermine the affirmative defense established by the government. The record clearly shows that a merit system produced the pay disparity between Ms. Thomas and her comparators.

CONCLUSION

Plaintiff's motion for summary judgment is denied because genuine issues of material fact remain as to her *prima facie* case of an Equal Pay Act violation. Because there are no genuine issues of material fact as to the government's affirmative defense, and because the government is entitled

to judgment as a matter of law, defendant's motion for summary judgment is granted. Accordingly, it is hereby **ORDERED** that

(1) Plaintiff's Motion for Summary Judgment, filed April 11, 2008, is **DENIED**;

(2) Defendant's Cross-Motion for Summary Judgment, filed April 30, 2008, is **RANTED**;

(3) The Clerk's Office is directed to **ENTER** final judgment in favor of defendant, **DISMISSING** the complaint, with prejudice; and

(4) Each party shall bear its own costs.

/s/Lynn J. Bush
LYNN J. BUSH
Judge

NOTE: This order is nonprecedential.

UNITED STATE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is DENIED.

The mandate of the court will issue on March 2, 2010.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: 02/23/2010
Cc: Ann Thomas
Carrie Dunsmore
THOMAS V US, 2009-5093
(CFC – 07-CV-212)

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-001

April 29, 2010

Ms. Ann Thomas
P.O. Box 1814
Atlanta, GA 30301

Re: Ann Thomas

Application No. 09A1037

Dear Ms. Thomas:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on April 29, 2010 extended the time to and including July 23, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely.

William K. Suter, Clerk
by /s/
Erik A. Fossum
Case Analyst

## EXCERPT FROM DEFENDANT'S RESPONSES TO PLAINTIFF'S EQUEST FOR INTERROGATORIES

INTERROGATORY NO.8:

Describe Defendant's merit system of promotion identified in paragraph 12 of Defendant's Answer.

RESPONSE:
Defendant's merit system of promotion is described in the Department of Labor Personnel Regulations ("DPR") Chapter 335, "Promotion and Internal Placement Plan", which is attached to these responses as Exhibit 1.

INTERROGATORY NO. 9:

Identify the factors "other than sex" which defendant relies as an affirmative defense in paragraph 13 of Defendant's Answer.

RESPONSE:
Defendant states that the reason that plaintiff is in grade GS-12, and paid differently than certain male co-workers in pay grade GS-13 is not because of her gender, but rather because she is not doing equal work to that of an individual in pay grade GS-13. Plaintiff does not have the same number of responsibilities as an individual in pay grade GS-13, and she requires more supervision than an individual in pay grade GS-13. Moreover, even if

plaintiff were doing work equal to that of an individual in pay grade GS-13, she still would be ineligible to be paid at that pay grade unless she had competed for, and been awarded, a GS-13 position. The career ladder for plaintiff's position is such that journey level grade is GS-12. For plaintiff to be promoted to a GS-13 position, therefore, a GS-13 position must open for competition, and an employee must compete for that position. To be paid at a GS-13 level, such as the men plaintiff has identified in her complaint, plaintiff would had to have competed for their positions when they were opened for competition, and have been considered to be the most qualified candidate for those positions. Plaintiff did not compete for any GS-13 position in the Boston, Chicago or Dallas offices and thus could not have been be awarded the positions and received same pay as any individual (male or female) in pay grade GS-13 in those offices. Plaintiff has competed for two GS-13 position in the Atlanta office, but was determined not to have been the most qualified candidate for those positions (both of which were awarded to women).

INTERROGATORY NO. 20:

Before joining to the Dallas Regional Office, Division of Workforce Security what and how much Unemployment Insurance experience did Theresa M. Brandon have?

RESPONSE:
Defendant objects to this interrogatory because the term "unemployment insurance experience" is vague, because many types of activities, past employment, or job duties may qualify as "experience" given the various duties Unemployment Insurance Compensation Specialists perform. Subject to and without waiving this objection, Defendant states that Ms. Brandon did not have any employment experience related to unemployment insurance programs prior to joining the Division of Workforce Security

October 1, 2007

# EXCERPT FROM DPR CHAPTER 335. PROMOTION AND INTERNAL PLACEMENT PLAN

Introduction. The Department of Labor administers its Human Resources Management Program in accordance with Title 5 of the United States Code, and Title 5, Code of Federal Regulations (C.F.R.). As specified herein or except as follows, the Department of Labor adheres to 5 C.F.R. Part 335. This Promotion and Internal Placement Plan is established as required by 5 C.F.R. 335.103.

1. Authority and Scope

a. Authority. This Plan is established to satisfy the requirement of Title 5, Code of Federal Regulations (C.F.R.), Part 335, for the establishment of competitive procedures designed to insure a systematic means of selection for promotion based on merit.

b. Scope. This Plan applies to actions described in Section 3, when used to make placements in vacant positions in the competitive service of:

(1) Current or former Federal employees who have Federal Civil Service status as a result of competitive examination or other means provided in law or Government-wide regulations;

(2) Applicants eligible under the Veterans Employment Opportunity Act (VEOA);

(3) Veteran recruitment (VRA) appointees, who serve on excepted appointments to positions in the competitive service; or

(4) Other non-status applicants authorized by law or Government-wide regulations to compete under agency competitive procedures.

c. Other methods for filling vacant positions. Announcing a vacancy under this Plan is only one method of locating applicants for a position and may be used in conjunction with other methods, such as competitive examining appointments and excepted service appointments. **Subject to applicable law and regulations, the method(s) to be used in identifying candidates and the selection of an individual to fill a position is the decision of management. This Plan in no way restricts management's right to make selections under other legitimate authorities for filling DOL vacancies.**

3. Actions Covered. The following personnel actions are covered by the provisions of this Plan:

a. Promotions other than those which are excepted in section 4 below;

b. Time-limited promotions for more than 120 days (prior service during the preceding 12 months under noncompetitive time-limited promotions and noncompetitive details to higher graded positions counts toward the 120-day total);

c. Details for more than 120 days to a higher grade position or to a position with higher promotion potential (prior service during the preceding 12 months under noncompetitive time limited promotions and noncompetitive details to higher graded positions counts toward the 120-day total);

d. Selection for training which is part of an authorized training agreement, part of a promotion program, or required by a formal training program before an employee may be considered for promotion;

e. Reassignment or demotion to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted under reduction-in-force);

f. Transfer to a position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service; and

g. Reinstatement to a permanent or temporary position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service.

4. Actions Excluded From Coverage. Actions not specifically described as covered actions in section 3 above are excluded from coverage by this Plan including, but not limited to, the following:

a. A promotion resulting from the upgrading of a position without significant change in the duties or responsibilities due to the issuance of a new classification standard or the correction of an initial classification error;

b. A position change permitted by reduction-in-force regulations;

c. A promotion without current competition of an employee who was appointed in the competitive service from a civil service register, by direct hire, by noncompetitive appointment or noncompetitive conversion, or under competitive procedures for an assignment intended to prepare the employee for the position being filled, (e.g., career ladder, trainee, and understudy positions, and conversions from various special appointing authorities (e.g., Career Intern Program, etc);

d. A promotion resulting from an employee's position being reclassified at a higher grade because of additional duties and responsibilities;

e. A temporary promotion, or detail to a higher-grade position or a position with known promotion potential, of 120 days or less;

f. Promotion to a grade previously held on a permanent basis in the competitive service (or similar OPM-approved system) from which the employee was separated or demoted for other than performance or conduct reasons;

g. Promotion, reassignment, demotion, transfer, reinstatement or detail to a position having promotion potential no greater than the potential of a position an employee currently holds or previously held on a permanent basis in the competitive service (or similar OPM-approved system) and did not lose because of performance or conduct reasons;

h. Priority consideration of a candidate not given proper consideration in a competitive promotion action;

i. Appointments of career SES appointees with competitive service reinstatement eligibility to any position for which they qualify in the competitive service at any grade or salary level, including positions established under 5 C.F.R., Part 319;

j. A temporary promotion made permanent if the temporary promotion was made under competitive procedures and the fact that it might lead to a permanent promotion was made known to all potential candidates; and

k. An appointment from a certificate of eligibles resulting from a competitive examination, e.g., delegated examining.

6. Special Considerations. Before initiating competitive procedures to fill a vacancy, the servicing Human Resources Office must determine if any individual is entitled to consideration for the vacancy by virtue of having been awarded some special consideration, as described below. However, such consideration does not guarantee the individual's selection.

a. Priority Consideration. An applicant who has not received proper consideration under the Plan may be granted priority consideration for the next appropriate vacancy by an arbitrator; the servicing Human Resources Officer; the Director of Human Resources, OASAM; the Office of Personnel Management; or other higher authority. Priority consideration under this Plan may be given as a remedy only to current DOL employees or to persons who were DOL employees at the time the error occurred.

(1) Priority consideration is confined to a position in the same occupational series, at the same grade level, and in the same DOL Agency and geographical location in which the error occurred. However, when circumstances warrant it, priority consideration may be extended occupationally, geographically, and/or

organizationally with the approval of the Director of Human Resources, OASAM.

(2) An individual who is awarded priority consideration is given such consideration once for each opportunity he/she lost. An individual who has received the required consideration reverts to his/her original status and is considered for future vacancies through normal procedures. If more than one individual failed to receive proper consideration in a given personnel action, they are considered together through priority consideration for the next appropriate vacancy.

(3) For information on priority consideration based on a discrimination complaint, see 29 C.F.R. Part 1614.

b. Repromotion Consideration. Employees whose positions are downgraded and who are entitled to grade or pay retention are eligible for special consideration for repromotion for two years. Such employees must be given consideration before competitive procedures are used to fill vacancies at their former grade or any intervening grades in positions for which they meet minimum qualification requirements. The extent to which these employees will be consider for vacant positions organizationally and geographically is the same as the scope of recruitment which the Agency typically uses in filling comparable positions through merit staffing.

c. Other Considerations. Employees and former employees may also be entitled to special placement considerations by Office of Personnel Management regulations, including those described in 5 C.F.R. Part 330.

11. Determining Basic Qualifications and Eligibility

a. Minimum qualifications requirements. The minimum qualification standards prescribed or approved by the Office of Personnel Management (including any required written tests or selective factors) will be used to determine basic eligibility of candidates for competitive consideration. These standards are available for review in the servicing Human Resources Offices.

b. Selective factors. Special qualification requirements may be used in accordance with OPM policy when they are essential to the successful performance of the position to be filled. The servicing Human Resources Officer (or designee) must approve the use of selective factors. The written justification for the selective factor(s) will be placed in the file for the specific vacancy. Vacancy announcements will identify the minimum qualifications standards (including selective factors).

c. Eligibility requirements. Applicants must meet time-in-grade and time-after competitive-

appointment requirements, as well as qualifications requirements, within 30 calendar days after either the closing date of the vacancy announcement or an advance registrant's deadline to file an application, to be eligible for consideration for selection

12. Evaluation and Referral of Candidates

a. Development of evaluation method. In order to evaluate candidates, whether from advance registration or who applied to a vacant announcement, the selecting official and the servicing Human Resources Office must first develop a validated method based on a job analysis for evaluating the candidates and determining who are the best-qualified candidates. Such methods may include a structured interview, test, assessment center(s), work sample or a crediting plan/rating schedule. For example, if you are using a crediting plan/rating schedule as an assessment tool, when evaluating applicants, you must have subject-matter certified crediting plan/rating schedule that is based on a job analysis of the position, which identifies the critical knowledges, skills, and abilities (KSA), or competencies, of the position. Once these KSAs are identified, the selecting official and the servicing Human Resources Office staff will develop a
method for identifying the degree to which each qualified candidate possess the KSAs and, thus, make a meaningful distinction among the candidates

as to which are the best qualified. For example, applicants who meet the minimum qualification requirements for the position could be rated on either a numerical scale (e.g., ... 88,89,90...), a nominal scale (e.g., Qualified, Highly Qualified, Exceptionally Qualified), or some other method. The job analysis and the evaluation method will be placed in the file for the specific vacancy announcement.

b. Determination of the best qualified candidates. The specific way to distinguish the best qualified from other candidates will depend on the evaluation method employed and the ability to make a meaningful distinction among the candidates. For example, subject matter experts may determine which candidates are best qualified based on its review of the application materials, or the candidates may be evaluated through an electronic analysis method. Also, the candidates may be given qualitative ratings (e.g., Qualified, Highly Qualified) or a numerical score. If a numerical scale is employed, the selecting official may set a minimum score to be met in order to be designated best qualified. In determining the best qualified candidates, the following factors may be considered: the nature of the position, the number of qualified candidates, the discernible differences among the candidates, and the number of vacancies to be filled. Although, all candidates will be rated/evaluated, any applicant with non-competitive eligibility (e.g.,

repromotion, change to lower grade, reassignment, transfer, Schedule A, VRA, etc.) may be rated/evaluated at the option of the Selecting Official. The number of candidates referred for final consideration will be based on how a meaningful distinction is made to determine the best qualified candidates.

c. Reevaluation of candidates. The servicing Human Resources Office may, at any time, review and initiate action to correct any error in the evaluation process. However, the candidate may not submit additional information or material related to his/her qualifications.

15. Information

a. Information about the Plan. The Plan will be maintained on the Department's Labornet to permit all employees access to it.

b. Qualifications Standards. Summaries of the qualifications requirements for positions are included on the vacancy announcements. Complete qualifications standards are contained in the Office of Personnel Management (OPM) document, Operating Manual for Qualification Standards for General Schedule Positions and are available on the OPM website (http://www.opm.gov) or from the servicing Human Resources Offices.

c. Information about basic eligibility and minimum qualifications. The servicing Human Resources Office will notify each employee who applies either under the advance registration process or to a specific vacancy announcement as to whether they meet eligibility requirements and minimum qualifications.

U.S. Office of Personnel Management Division for
Human Capital Leadership & Merit System
Accountability Classification Appeals Program
**Atlanta Field Services Group**
**75 Spring Street, SW., Suite 1018**
Atlanta, GA 30303-3109

**Classification Appeal Decision**
**Under section 5112 of title 5, United States Code**
**Appellant:** [name]
**Agency classification:** Unemployment Insurance Program Specialist
GS-106-12
**Organization:** [organization]
Office of Regional Administrator
Office of Field Operations
Employment and Training Administration
Region [#]
U.S. Department of Labor
**OPM decision:** Unemployment Insurance Program Specialist
GS-106-12
**OPM decision number:** C-0106-12-01

/s/ Robert D. Hendler
Robert D. Hendler
Classification and Pay Claims
Program Manager
August 16, 2005
Date ii

As provided in section 511.612 of title 5, Code of Federal Regulations, this decision constitutes a certificate that is mandatory and binding on all administrative, certifying, payroll, disbursing, and accounting officials of the government. **The agency is responsible for reviewing its classification decisions for identical, similar, or related positions to ensure consistency with this decision.** There is no right of further appeal. This decision is subject to discretionary review only under conditions and time limits specified in the *Introduction to the Position Classification Standards*, appendix 4, section G (address provided in appendix 4, section H).

Decision sent to:
[appellant]
[address]
[location]
[name]
Human Resources Officer
U.S. Department of Labor
[address]
[location]
Director, Human Resources Center
U.S. Department of Labor
200 Constitution Avenue, NW., Room C5526
Washington, DC 20210

**Introduction**

On January 19, 2005, the Atlanta Field Services Group of the U.S. Office of Personnel Management (OPM) accepted a classification appeal from [appellant]. She works as an Unemployment Insurance Program Specialist, GS-106-12, in the [organization], [organization], Office of Regional Administrator, Office of Field Operations, Employment and Training Administration, Region [#], U.S. Department of Labor (DOL), [location]. The appellant requests that her position be reclassified to the GS-13 grade level. We received the complete appeal administrative report on February 24, 2005. We have accepted and decided his appeal under section 5112(b) of title 5, United States Code (U.S.C.).

**General issues**

The appellant believes that the duties and responsibilities and the qualifications required of her position are comparable to those of GS-13 positions in her immediate organization. By law, we must classify positions solely by comparing their current duties and responsibilities to OPM standards and guidelines (5 U.S.C. 5106, 5107, and 5112). Since comparison to standards is the exclusive method for classifying positions, we cannot compare the appellant's position to others, which may or may not be classified correctly, as a basis for deciding the appeal.

Like OPM, the appellant's agency must classify positions based on comparison to OPM standards and guidelines. However, the agency also has primary responsibility for ensuring that its positions are classified consistently with OPM appeal decisions. **If the appellant considers her position so similar to others that they all warrant the same classification, she may pursue the matter by writing to her agency's human resources headquarters. In doing so, she should specify the precise organizational location, classification, duties, and responsibilities of the positions in question. If the positions are found to be basically the same as hers, the agency must correct their classification to be consistent with this appeal decision. Otherwise, the agency should explain the differences between her position and the others.** In reaching our classification decision, we have carefully reviewed all information furnished by the appellant and the agency, including the interviews with the appellant and the supervisor, and all information of record.

**Position information**

The appellant is assigned to position description (PD) number [#]. The supervisor certified the accuracy of the PD. The appellant did not certify accuracy. She believes she functions as an agency expert in her program assignments and disagrees with the agency's assessment of the knowledge required by the position and scope and effect of the position. We find that the PD of record contains the

major duties assigned to and performed by the appellant and we incorporate it by reference into this decision. The appellant performs assignments involving DOL oversight of operation of the Unemployment Insurance (UI) program by the eight State agencies falling under the Region [#] Regional Office (RO). Her primary responsibilities involve specific areas of the State Quality Service Plans

DEFENDANT'S STATEMENT OF UNDISPUTED FACT

87. Promotion in ETA is similar to other Labor agencies or federal agencies. A38 (¶ 8). Promotions are generally on a competitive basis. Id. There are certain circumstances that if positions become vacant, management has the authority to move qualified individuals at the same pay grade as the vacancy into the position without announcing the position for competition. Id. Also, individuals that are certified in ETA's Leadership Program are eligible for promotions up to two years in a non-competitive process.